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Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (Alta. C.A.)

Between
Caterpillar Tractor Co., Caterpillar Americas Co., and Caterpillar of Canada Ltd., Appellants (Defendants), and Ed Miller Sales & Rentals Ltd., Respondent (Plaintiff)

[1988] A.J. No. 810

61 Alta. L.R. (2d) 319

90 A.R. 323

22 C.P.R. (3d) 290

12 A.C.W.S. (3d) 107

Appeal No. 8803-0195 AC

Alberta Court of Appeal

Laycraft C.J.A., Haddad and Bracco JJ.

September 8, 1988

M.H. Dale, Q.C., and G.J. Draper, for the Appellants.
H. Rubin and J.B. Laskin, for the Respondent.

REASONS FOR JUDGMENT

LAYCRAFT C.J.A. (for the Court, allowing the appeal in part):-- On this appeal the Caterpillar companies seek to overturn an interlocutory order made in Chambers in Court of Queen's Bench by mr. Justice Wachowich. The order directed them to produce certain working papers created by their

chartered accountants and, further, to produce depositions made in another action in the United States Federal Court which are the subject of a confidentiality order made there.

I would allow the appeal with respect to the production of the working papers but would dismiss it as to the production of the depositions.

This complex litigation has a long history. The action was commenced on May 15, 1980. by Ed Miller Sales & Rentals Ltd against the three Caterpillar companies and all of the authorized Caterpillar dealers in Canada. Miller alleged that the marketing arrangement between the Caterpillar companies and their authorized dealers is an unlawful criminal conspiracy in breach of the common law and in breach of sections 32, 33, 34 and 38 of Part V of the Combines Investigation Act R.S.C 1970 c. C-23.

After the action commenced, proceedings in chambers to compel Miller to supply further and better particulars occupied more than three years. In September, 1983 this Court directed that particulars be supplied. The order was complied with and pleadings were closed. Examinations for discovery have been lengthy and are not yet completed. As the action has progressed, the plaintiff has discontinued it against all of the authorized caterpillar dealers except R. Angus Alberta Limited.

The Working Papers Dispute

The "working papers" in dispute were created by Price Waterhouse & Company, a firm of chartered accountants. Some years before this action was commenced, the Director of Investigation and Research appointed under the Combines Investigation Act initiated an inquiry into the production, supply and distribution in Canada of equipment manufactured by Caterpillar. He presumably acted under the authority of Section 8 of the Combines Investigation Act which required him to commence an inquiry, inter alia, whenever he had reason to believe that a ground existed for an order by the Restrictive Trade Practices Commission under Part IV.1 or he had reason to believe that an offence under Part V of the act had been, or was about to be, committed. The subjects of the inquiry were Caterpillar Americas Co., Caterpillar of Canada Ltd. and a number of authorized dealers in Canada including Angus.

One of the principal subjects of the inquiry, and of this litigation, relates to a charge of five per cent of the list price of equipment which is charged by Caterpillar to an authorized dealer (and presumably passed on by him to his customer) when he sells Caterpillar equipment to a customer anywhere in the world in the geographical area served by another dealer. Caterpillar says that this charge is to cover warranty service and other "no-charge" services which the other dealer is required to provide when the equipment is moved into his area. Miller alleges in this action that the charge is a sham which, in any event, is often not paid to the other dealer. The purpose of the charge, it is said, is simply to raise the cost of equipment to buyers such as the plaintiff so that they will be unable to compete with authorized Caterpillar dealers in re-selling or renting the equipment.

The companies who were the subject of the inquiry retained a Toronto law firm to represent

them. For the purpose of advising them, the law firm retained Price Waterhouse to prepare a study of costs incurred by a number of Canadian Caterpillar dealers in providing the disputed no-charge services. Price Waterhouse created a form on which they recorded raw data from the operations of each dealer. They then analyzed the data and estimated the cost of "no-charge" services. This process was more than a simple calculation since it involved the creation of a statistically valid sample and an analysis of the data obtained from the sampling unit.

The result of this work was a report issued on may 8, 1978 and addressed to the law firm. The report stated that warranty and delivery service cost 4.25% of list price, with a precision of plus or minus .6% and that there were other additional costs the amount of which they were unable to determine. The cost of these no-charge services is very much an issue in this litigation; Miller contends that the actual cost of them is less than one per cent of the list price of the equipment while the Caterpillar Companies say that the charge of five per cent is a valid charge.

The Caterpillar Companies supplied a copy of the report to the Director of Investigation and Research. They did not supply the working papers and the Director did not ask for them. Ultimately he discontinued the inquiry without prosecuting the Caterpillar companies or any of the authorized Caterpillar dealers and without taking any proceedings before the Restrictive Trade Practises Commission.

On the examination for discovery of an officer of R. Angus Alberta Limited, a copy of the Price Waterhouse report was produced by that company on request. Counsel for the Caterpillar companies was present at this discovery. He put no objection on the record but says he attempted to persuade counsel for Angus not to produce it.

On the examination of the officer produced by the Caterpillar companies, counsel for Miller produced the copy of the report which he had obtained on the examination of the Angus officer. It was marked as an exhibit and he proceeded to examine on various issues arising out of it. He requested production of the working papers from which Price Waterhouse had prepared the report. Appellants' counsel declined to produce them on the ground that they are documents which were prepared for the assistance of counsel in litigation.

In Court of Queen's Bench, Mr. Justice Wachowich ordered the production of the working papers. He cited the decision of this court in Nova v. Guelph Engineering company [1984] 3 W.W.R. 314 for the proposition that, to be protected by solicitor-client privilege, a document must have been prepared "for the dominant purpose of submission to the legal adviser with a view to litigation". He then said:

> "The facts in the present case do not satisfy me that the accounting report and the working papers were prepared for the dominant purpose of anticipated or pending litigation. When the Report was prepared, Caterpillar was merely being investigated pursuant to the Combines Investigation Act. This constitutes the evidence gathering stage of the enforcement scheme of the Combines

> Investigation Act (Roberts, Anticombines and-Antitrust (1980) at p. 489). The evidence gathered may result in charges being laid, or may in fact lead to no action at all. As the Report by Price Waterhouse was prepared during this preliminary investigative period, it can hardly be said that the dominant purpose for its submission was with a view to anticipated litigation. Though one of the objectives for its preparation may have been to provide information to solicitors, this would not be sufficient to satisfy this test and bring it within the document privilege. Any possible litigation leading from the investigation appears to have been too remote to support the view that the Report became privileged under the dominant purpose test."

I confess that, to me, to say they were "merely being investigated" seems an unduly sanguine description of the process in which the Caterpillar companies were then involved. They were "merely being investigated" but that investigation had the potential for the gravest consequences, both civil and criminal. It was the first step in a procedure which could ultimately lead to huge fines, to jail sentences for individuals, to the destruction of their marketing and warranty system, and to civil liability if the facts established showed breaches of the statute.

It is safe to say that anyone against whom has been set in motion the complex processes of the Combines Investigation Act has immediately sought, and certainly required, legal assistance. While the procedures of the statute are lengthy and cumbersome, and while the conclusion of them may be years away when the inquiry is launched, the danger is nevertheless real. I would consider that litigation was anticipated and, indeed, was then in progress.

The adversarial process has always found difficulty in reconciling the conflicting interests of disclosure and legal professional privilege. The modern trend has been toward broadening the discovery process so that the courts decide issues between parties on a full review of the facts. In this Court that trend is evident in such cases as Czuy v. Mitchell [1976] 6 W.W.R. 676 and Drake v. Overland [1980] 2 W.W.R. 193.

In Nova v. Guelph Engineering Company (supra), Stevenson J.A. reviewed the practice in Alberta in the light of cases in other jurisdictions, particularly the decision of the House of Lords in Waugh v. British Railway Board [1980] A.C. 521. He stated the test for production derived from Waugh in these terms:

> "... a party need not produce a document otherwise subject to production if the dominant purpose for which the document was prepared was submission to a legal advisor for advice and use in litigation (whether in progress or contemplated). Such documents are shielded from production by what is usually described as legal professional privilege."

The case law in Alberta had previously stated the "substantial purpose" test for the existence of legal professional privilege: Bourbonnie v. Union Insurance Society of Canton (1959) 28 W.W.R.

455 and [1959] 28 W.W.R. 455 and Gillespie Grain Co. v. Wacowich [1932] 1 W.W.R. 916. The Court nevertheless adopted the "dominant purpose" test from Waugh following three other Canadian Courts of Appeal in doing so: British Columbia in Voth Bros Const. (1974) Ltd. v. Bd. of School Trustees of School Dist. 44 (North Vancouver) [1981] 5 W.W.R. 91; Nova Scotia in Davies v. Harrington (1980) 39 N.S.R. (2d) 258; and New Brunswick in McCaig v. Trentowsky (1983) 148 D.L.R. (3d) 724. At pages 191-192 in Nova Stevenson J.A. discussed the rationale for the more restrictive rule. He said:

> "In my opinion the sole viable rationale is to be found in the demands of the adversary system. I do not see any real impeliment to the functioning of the adversary system in restricting this rule of privilege as the House of Lords has done. The only case for exclusion which can be made is for documents which were brought into existence by reason of an intention to provide information to solicitors. That this is an object is insufficient - such a test provides a cloak where other purposes predominate. Such a test would clothe material that probably would otherwise have been prepared, and otherwise not privileged, with a privilege intended to serve a narrow interest. Such a test conflicts with the object of discovery today which is to disclose material provided for other purposes. It would be possible to formulate other tests, but in the interest of uniformity as well as for the reasons expressed by the House of Lords, I would adopt the dominant purpose test."

In my view, the report and working papers in this case meet the "dominant purpose test". Indeed, they seem to have been created for the sole purpose of use by the solicitors in the litigation then in progress. I also respectfully disagree with the opinion of the Chambers Judge that, since the Companies "were merely being investigated", the purpose for which the papers were created was too remote from the ultimate conclusion of the process.

The effect of the order made is that in the early stages of a proceeding under the - - ines Investigation Act a lawyer's brief must be disclosed. At some point, presumably when the prospect of penalties or civil liability approaches ever closer, the position would reverse itself and favour protection of the brief. Effective legal representation is impossible on those terms. The bulwark of defence one seeks to erect, as the procedures under the Act commence, will be hollow, indeed, if it is only at the later stages of the procedures that a lawyer's brief is to be protected.

For Miller it is urged that an inquiry by the Director of Investigation and Research under the Combines Investigation Act is not litigation. Alternatively it is said that, if the documents were ever privileged, that privilege ended once the Director terminated his inquiry. In my view both arguments take too narrow a view of the term "litigation". Once the Director focussed on the Caterpillar Companies to inquire whether they were guilty of offences under the Act, litigation in the fullest sense of the word was then in actual progress let alone in contemplation. The parties could look ahead to many Possible procedures. Some under the Act had possible penal

consequences; some were civil as this very action establishes. All involved the same issues. The inquiry seems to have resolved itself to the question of the cost of the Caterpillar "no-charge" services and the very same issue appears at the forefront of this action.

The conclusion of the Director's Inquiry did not mean that the litigation was ended. Section 39 of the Combines Investigation Act expressly provides that civil rights of action remain despite the provisions of the Act. The issues raised by the Director were still open to other litigants such as the respondent.

The respondent cited a number of authorities which hold that medical reports obtained by a plaintiff's solicitor and privileged in one action must be produced if the same plaintiff has another accident some time later and is engaged in litigation with respect to it. Typical of such cases are Griffiths v. Mohat [1981] 5 W.W.R. 477 (B.C.S.C.) and Meany v. Busby (1977) 15 O.R. (2d) 71 (Ont. H.C.J.). Whether these cases would be followed in Alberta, I do not need to decide in this case. They do not apply to this case in any event. The difference between those cases and this one is that, in the medical cases, it could hardly be said that litigation was in contemplation for a second accident which hadn't yet happened when the report was prepared. In this case the civil litigation on the issues of the inquiry must have been in contemplation from the commencement of the inquiry.

The respondent also contends that, if the privilege existed, the Caterpillar Companies waived that privilege, first by handing the report to the Director, or secondly by failing to object when the report was produced at the examination for discovery of the officer of R. Angus Alberta Limited. Again, in my view, neither argument has substance.

It must first be noted that the Director's inquiry is not a public proceeding. The Director hears witnesses in private and even in the absence of other subjects of the inquiry and their solicitors. Secondly, to hand a privileged document to one party to litigation for the purpose of settlement or any other purpose, does not, in my opinion, show any intention that the privilege is thereby to terminate as to other parties or in related litigation.

The Respondent also argued that the Caterpillar Companies waived any privilege which existed by failing to object when the officer of R. Angus Alberta Limited produced the Price Waterhouse report on his examination for discovery. The simple answer is that, even if one litigant has the status to interject on the examination for discovery of another, the objection is pointless if his co-defendant is resolved to produce the document. Waiver depends on intention. Failure to make a pointless objection does not, in my opinion, demonstrate that intention.

I would allow the appeal as to the production of the working papers and direct that they are not required to be produced.

The Production of the Depositions

In 1977 Caterpillar Tractor Co. commenced an action in Federal court in the United States

against Earthworm Tractor Co. alleging trademark infringement. Earthworm Tractor co. counterclaimed alleging breaches of United States anti-trust legislation. On September 27, 1978, the United States District Court for the Southern District of New York issued an order designating as confidential, certain proceedings, documents and testimony in the action.

The order was made by consent. It provided that within 30 days after documents or testimony was given, a party could designate the portions of it which were to be confidential, subject to the right of the court to disallow an unreasonable designation. Thereafter neither party could disclose the information, testimony, or depositions to other persons. Clause 3 of the order provided:

> "3. The restrictions and limitations set forth in the preceding paragraphs shall be observed until the parties consent in writing to their removal or, by Order of this Court, upon motion of a party to be relieved of this Acknowledgment and Consent made upon fifteen (15) days' written notice to the attorneys of record for the other party."

Some time after this order was issued, the parties to the action made a further agreement that either party could designate testimony or documents including those produced by itself or by third-party witnesses as "superconfidential". Thereafter, that material could be seen only by counsel for the opposite party and not by that party's officers or employees.

An officer of Ed Miller Sales & Rentals Ltd. was examined for discovery by both sides in the United States action. Mr. Rubin, who appeared for Miller on this appeal, also appeared for Miller in the United States action. On behalf of Miller, he joined counsel for Earthworm in claiming confidentiality for the depositions of the Miller officer. Counsel for Earthworm also objected to counsel for Caterpillar Tractor Co. in the United States consulting with that company's counsel in this action on the ground that information disclosed in one case might be used in the other. The United States District Court directed that confidential information should not be made available to Canadian counsel for the Caterpillar Companies in this action.

Although Mr. Rubin claimed the benefit of the confidentiality order for the evidence of the Miller officer, he subsequently attempted to obtain access to the transcripts and documents in the United States action. On September 30, 1982 his request was presented by counsel for Earthworm to the United States District Court. That court refused the request and affirmed the direction that Canadian counsel for the Caterpillar Companies in this action could not have access to the material either.

The United States action was settled but the confidentiality order has not been discharged or amended. The settlement agreement contained various terms to maintain the confidentiality but the precise wording of them is not before us. In an affidavit filed in Court of Queen's Bench, however, Mr. Rubin states that counsel for Earthworm in the United States advised him that Earthworm was willing to release the transcripts of Caterpillar officers, employees and dealers. But counsel for Earthworm said that the Company was unable to do so because the settlement agreement totally prohibited Earthworm or its counsel "from cooperating with the plaintiff in the prosecution of its

litigation in the Court of Queen's Bench in Alberta...".

During his examination for discovery of the officer of the Caterpillar Companies in this action, Mr. Rubin requested production of the transcripts of the Caterpillar witnesses in the United States action. Production was refused on the ground that they are subject to the confidentiality order in the United States Action.

In Court of Queen's Bench Mr. Justice Wachowich ordered that the transcripts be produced. He found that the transcripts had a possible relevance to this action, a point which was conceded by counsel on this appeal, He then said:

> "I find the case of Abernethy v. Ross (1985) 65 B.C.L.R. 142 (B.C.C.A.) applicable in these circumstances. The Court ordered the Defendants to produce transcripts of discoveries of those defendants from another action. The Court recognized that discoveries from previous actions could not be used for improper purposes but this did not make them privileged. They refused to adopt a rule that would prevent the court from learning what a party had said under oath in the past.
>
> I see no reason why the same principles should not be applied in the present circumstances. The depositions in the U.S. action may provide useful information to assist this court in determining the true facts in the present case. In my view, this would not be using the documents for an improper purpose. As far as these documents are possibly relevant to the present case, and may be of assistance in ascertaining the truth, they should be produced by the Defendant.
>
> I would follow the S.C.C. decision in Spencer v. R. (1985) 62 N.R. 81 as to the procedure to follow when foreign laws or judicial acts are contrary to our law. The Defendant (Respondent) will be given a reasonable time in which to apply to the United States District Court, Southern District of New York, to have the Confidentiality Order modified to allow production in this case. Failing this, there will be an Order that the Defendant produce the Earthworm Depositions to the Plaintiff herein."

In my view, the question of "Privilege" does not really arise with respect to these transcripts. I respectfully agree with the conclusion of the British Columbia Court of Appeal in Abernethy v. Ross (supra) that discoveries are confidential in the sense that they may not be used for an improper purpose. That caveat on their use, however, does not mean that the transcripts are privileged.

In this case the confidentiality which the Caterpillar Companies contend precludes their production of the transcripts is largely of their own creation. The order which binds them is a

consent order; the confidentiality is of their own designation. Moreover, on the material before the Court, the consent of the other party to the United States action is forthcoming. Thus it would seem simple for them to remove the restriction on production. I am unable to agree that a party can prevent production of a relevant document, otherwise subject to production, in a Canadian court by its own action (or inaction) in another Jurisdiction.

I am also of the opinion that the decision of the Supreme Court of Canada in Spencer v. R. (supra) is applicable to this situation. In that case the officer of a Canadian bank was subpoenaed to give evidence in an income tax prosecution of a customer of the bank arising from transactions in the Bahamas. He objected to testifying on the ground that he would thereby breach the secrecy provisions of, and commit an offence under, Bahamian law.

The Supreme Court of canada held that he was compelled to testify notwithstanding the Bahamian statute. The comity of nations requires that "Canadian Courts should not lightly disregard the Bahamian provisions requiring the appellant in this case to testify" (per Estey J. at page 85). It would therefore be desirable to allow the appellant time to obtain an order in the Bahamas permitting the testimony. But, in any event, the nature of the prosecution would have compelled the Canadian court to take the testimony. Estey J. concluded at page 86:

> "If an authorizing order had not been sought or obtained within a reasonable time, the Canadian courts would have had no option, having regard to the subject matter of these proceedings, but to proceed in the manner indicated by the Ontario Court of Appeal below."

I respectfully agree with the disposition of this point by Mr. Justice Wachowich. Since the success on this appeal has been divided I would direct that there be no costs of the appeal.

LAYCRAFT C.J.A.
HADDAD J.A.:-- I concur.
BRACCO J.A.:-- I concur.